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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, Local 550, TWU, AFL-CIO, et al.
Petitioners,

vs.

AMERICAN AIRLINES, INC.,
Respondent.

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. OPPOSING REVIEW

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AMERICAN AIRLINES, INC.,

Respondent.

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. OPPOSING REVIEW

The Court of Appeals decision that petitioners seek to review denies their claim that a settlement agreement, as they interpret it, entitles them to retroactive credits under American Airlines' Retirement Plan for Flight Attendants.[1] In rejecting

[1] American Airlines, Inc. is a subsidiary of AMR Corporation, and other subsidiaries of AMR Corporation are Flagship International Corporation, AMR Services Corporation, AMR Energy Corporation, and AA Training Corporation.

Petitioners, who number approximately 120 (Rec. App. 155), had been terminated by respondent as flight attendants during 1965 to 1970 and had returned to work in 1979 or later pursuant to the settlement agreement. They contend that the settlement agreement gave them retroactive retirement credits for the terminated years when they were not working for American and for the earlier years of employment. Only a few petitioners had been members of the contributory plan during their prior employment (*id.* 156).

(Footnote continued on following page)

petitioners' interpretation, the Court of Appeals thoroughly analyzed the relevant provisions of the settlement agreement and the retirement plan with other documents in the record. Petitioners do not attack the merits of the Court of Appeals decision in reversing the District Court's adoption of petitioners' interpretation. They contend, as indicated by the three questions the petition presents (Pet. 1), that the Court of Appeals' function as a court of review was too limited for it to interpret the settlement agreement. The Court of Appeals, they argue, should have remanded the case for evidentiary hearings and findings of fact. Considerations ignored by petitioners, which include the background of the litigation and their method of conducting this proceeding, show that the petition should be denied.

STATEMENT OF THE CASE

Significant facts are omitted or misapprehended in the petition's "Statement of the Case" and "Questions Presented."

The petition would prolong a litigation begun in August 1970.[2] The class action against respondent alleged that the airline's practice of terminating flight attendants on pregnancy

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Despite the contrary admonition in Supreme Court Rule 19.1, respondent has requested the printed record of the present motion proceeding, which is wholly documentary and comparatively short, to be sent to the Clerk of the Supreme Court. Respondent deems it important to show, as this answer explains, that petitioners' present contentions are inconsistent with their conduct of the proceeding on their motion. The references in this brief to "Rec. App." are to the printed appendix filed by respondent in the Court of Appeals.

[2] The length of time is evident from the fact that Mr. Justice Stevens sat on one of the earlier episodes of the litigation in 1973, *ALSSA* v. *American Airlines, Inc.*, 490 F. 2d 636 (7th Cir. 1973), cert. den. 416 U.S. 993, and has recused himself in this court in later episodes. 439 U.S. 876; 454 U.S. 886, 960; 455 U.S. 382, 915, 932.

violated Title VII of the Civil Rights Act of 1964.[3] American abandoned the practice in October 1970. The litigation continued over claims for back pay, reinstatement, etc., by flight attendants terminated during 1965-1970. The American settlement agreement now involved, entered into in August 1977, was intended by all federal courts and all parties to terminate the litigation. The agreement stated expressly (Sec. II) that its purpose was to settle all claims that "have or might have been raised" under the pleadings (Rec. App. 9-10).

The key provision of the comprehensive settlement agreement (Rec. App. 8-28) was Section III (*id.* 10). Respondent

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[3] A companion class action against Trans World Airlines, Inc. (No. 70 C 2071) was filed on the same day as the action against American (No. 70 C 2069), and the cases were consolidated. The many appeals in the litigation, all in the Seventh Circuit, are summarized:

ALSSA v. *American Airlines, Inc.*, 455 F. 2d 101 (1972), held the EEOC was properly denied intervention in a proceeding to approve a 1972 settlement of both cases.

ALSSA v. *American Airlines, Inc.*, 490 F. 2d 636 (1973), *cert. den.* 416 U.S. 993, reversed a District Court approval of the 1972 settlement.

ALSSA v. *American Airlines, Inc.*, 573 F. 2d 960 (1978), *cert. den.* 439 U.S. 876, sustained District Court approval of the American 1977 settlement, at issue in this appeal.

In re Consolidated Proceedings in Airline Cases, 582 F. 2d 1142 (1978), sustained a summary judgment against TWA and held some class members had failed to comply with the Title VII time limit, which was held jurisdictional.

ALSSA v. *TWA*, 630 F. 2d 1164 (1980), affirmed District Court approval of later TWA settlement.

Zipes v. *TWA*, 455 U.S. 385 (1982), affirmed approval of TWA settlement and held Title VII time limit not jurisdictional.

Zipes v. *TWA*, (1983) No. 82-1889 (unpublished), interpreted TWA settlement contract.

Zipes v. *TWA*, 713 F. 2d 319 (Aug. 1983), interpreted TWA settlement contract.

Freedman v. *ALSSA*, 730 F. 2d 509 (1984), *cert. den.* 105 S. Ct. 167, interpreted TWA settlement contract.

there agreed to pay $2,700,000 to the class members (Clause A) and reemploy those ready and qualified to work (Clause B) with seniority and credit for length of service as provided elsewhere in the agreement (Clause C). Conversely, a limitation in Clause D stated that American had "no monetary or other obligation . . . unless expressly provided" in the agreement. These provisions were implemented by detailed terms in Sections IV (Calculation of Payments to Class Members), V (Seniority and Credit for Length of Service), and VI (Reemployment).

Petitioners through their then counsel sought and obtained approval of the agreement and dismissal of the three involved actions by a District Court order of October 4, 1977.[4] They obtained affirmance of the order in the Court of Appeals and the denial of certiorari here. *ALSSA* v. *American Airlines, Inc.*, 573 F. 2d 960, cert. den. 439 U.S. 876.[5]

MOTION PROCEEDING IN DISTRICT COURT

In early 1983 petitioners began the present proceeding through new counsel by filing a motion with two alternatives. The motion claimed that the settlement agreement granted them retroactive credits under respondent's Retirement Benefit Plan. The motion alternatively asked the court, if retirement credits were held not granted by the settlement, to vacate the 1977 order approving the settlement and dismissing the actions. The motion stated that it was made "pursuant to Rule

[4] Petitioners ignore the dismissal of the actions when they refer (p. 16) to their employment as "illegally terminated." The dismissal nullified the summary judgment of liability previously ordered by the District Court as well as respondent's then pending appeal therefrom. Appendix 1a, respondent's brief in Court of Appeals.

[5] The certiorari petition (p. 15) fails to indicate that the petitioners obtained this result in the Court of Appeals and successfully resisted certiorari.

60(b)(6), Fed. R. Civ. P."[6] The court was alleged to have jurisdiction over the motion pursuant to Section XIII of the agreement, which stated it was enforceable under the District Court's power to enforce its orders (Rec. App. 25). Respondent's answer to the motion admitted facts about the history of the litigation but denied the crucial allegations claiming retroactive retirement credits.[7]

Petitioners' contention was that retroactive retirement credits were granted to them by the clause in Section V A of the settlement agreement that each re-employed class member shall be "credited with the . . . length of service" to which she was entitled on termination and thereafter until the date of the agreement. The words "credited with the . . . length of service" were asserted to be the equivalent of the term "credited service" in respondent's retirement plan (Rec. App. 50). That was the substantive issue raised by petitioners' motion. Respondent denied this contention, saying that "credited service" was not used in the settlement agreement and that the term, as defined in the voluntary plan, required membership and contributions by flight attendants (*id.* 110).[8]

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[6] Rule 60 is quoted in Appendix A hereto.

[7] The petition (pp. 17-18) incorrectly says that respondent admitted all the material factual allegations of the motion and that it "primarily contended that the agreement was clear and unambiguous on its face." It was the petitioners who introduced the contention that the settlement agreement was "clear and unambiguous" and that nothing extrinsic could be considered (Rec. App. 51-2).

[8] The definition of "Credited Service" in the plan provided, "A Member's Credited Service shall not include any period for which he or she does not make Employee Contributions" (Rec. App. 164, 176). Similarly a booklet describing the plan for flight attendants explained, "*credited service* is the period of employment for which you have made contributions as a member of the Plan" (*id.* 68). The plan required every member to make contributions at certain percentages of compensation and American to contribute in such an amount as would, with employee contributions, fund the obligations of the plan

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As explained further in the argument, the parties followed the usual contested motion practice in the District Court. An extensive record of memoranda, with affidavits and documents attached, was accumulated (Rec. App.: petitioners': 41-104, 123-38, 250-80; respondent's: 34-40, 105-22, 139-249, 281-323). There was no discovery by deposition or otherwise, no evidentiary or other hearings, no oral argument.

The District Court granted petitioners' motion to enforce the settlement (Memorandum Opinion and Order, Pet. App. 24a-28a). The opinion, citing decisions of the Appellate Courts of Illinois, the state in which the agreement was executed, adopted petitioners' contentions that the terms of the settlement agreement were "clear and unambiguous" and that extrinsic evidence could not be considered to "change the meaning." According to the "clear terms," the opinion said, the returning class members were entitled to "all of the benefits they would have received had they not been discharged by American."[9] The phrase "credited with the . . . length of service" in Section V A was held to mean that the returning class members were "entitled to the benefits of the Plan consistent with their credit for length of service." The opinion concluded that the petitioners "must be credited with their length of service" during the periods of prior employment and termination "for purposes of qualifying, vesting and calculating benefits" under the plan.

The petition (pp. 18-19) is incorrect in describing the District Court's opinion. It did not conclude, as the petition asserts, that the settlement agreement "expressly included the retirement benefits at issue" (Pet. App. 26a). As noted, a

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on a sound basis (Rec. App. 177-178). Only one or two petitioners had contributed to the plan when they were initially employed during 1965-70 (*id.* 156).

[9] The opinion quoted nothing in the agreement to support this broad assumption, which was directly contrary to the overall plan of the agreement and its express terms, particularly the Section III D provision that American had "no monetary or other obligation" unless expressly provided.

crucial provision of the agreement, after expressly imposing certain obligations on American, provided that it had no obligation to any class member "unless expressly provided in the agreement" (Section III D). The District Court opinion and order did not mention Section III D or use the word "expressly" attributed to it by the petitioners. They would thus create the impression that the District Court did not ignore Section III D but, by using the word "expressly," made a finding that the requirement of express provision was satisfied. Further, the petition is incorrect in saying that the District Court "did not review any extrinsic evidence of record." It is true the order purported to apply the principle that nothing extraneous to a "clear and unambiguous agreement" may be considered. But the opinion and order actually considered provisions of the retirement plan and a new 1980 version of the plan (*id.* 26a-27a).

DECISION OF COURT OF APPEALS

On respondent's appeal, the Court of Appeals rejected the District Court's interpretation in a detailed analysis, pointing out the error in the holding that "the Settlement Agreement unambiguously awards retroactive retirement credit to returning class members." (Pet, App. 4a-6a). After noting that the District Court had applied Illinois law under the principle that state law governs the interpretation of a settlement agreement, the opinion discussed Illinois decisions to the effect that the meaning of an ambiguous contract "becomes a question of fact to be submitted to the trier of fact." The opinion then explained what the petition chiefly criticizes, that the court was not following the "general rule" under which at that point the court would ordinarily remand to the District Court for findings of fact. The opinion acknowledged that in *Anderson* v. *City of Bessemer City*, 470 U.S. ___, 105 S. Ct. 1504 (1985), the Supreme Court "cautions courts of appeals against reviewing a

lower court's findings of fact *de novo,* even when those findings are based on documentary evidence." (*id.* 7a, n5).

Petitioners fail to mention the "strong reasons" explained fully by the Court of Appeals for not remanding the case for findings. The reasons are enumerated in the following quotation from the opinion (Pet. App. 6a-7a, Ital. added):

(1) "The parties have *thoroughly briefed* the issue before us and have submitted to us *all the extrinsic evidence* that they have.

(2) "The evidence is *entirely documentary; no determinations of the credibility of witnesses are required.* We are in as good a position to evaluate this evidence as the district court.

(3) "Our own survey of the evidence persuades us that it compels one conclusion and that a *contrary conclusion would be clearly erroneous.*

(4) "To remand the case would require yet a third round of argument in the district court, doubtless to be followed by a fourth round on appeal. When we know the inevitable outcome, it would be *a waste of judicial resources and an undue burden on the parties for us to order a remand.*"

The opinion then considered, under the following headings, the evidence relevant to the claim for retroactive retirement credits:

B. The Extrinsic Documentary Evidence (Pet. App. 7a)
   (i) American's Regulations (8a)
   (ii) The Collective Bargaining Agreement (9a)
   (iii) The Retirement Plan (10a)
C. Length of Service in Section V A (11a-13a)
D. Burmeister's Position (14a)
E. Analysis (15a-21a)

With two minor exceptions, only documentary materials were discussed in the analysis. The exceptions were two affidavits, one filed by petitioners (Rec. App. 98) and one by respondent

(*id.* 155). No question of credibility was involved in the opinion's treatment of the affidavits (Pet. App. 15a, 19a).

The reasoning in the Court of Appeals' analysis, concluding that the settlement agreement does not provide the claimed retroactive retirement credits (Pet. App. 20a-21a), is indicated by the following quotations:

> " 'Credited Service' is a defined term of the Retirement Plan that conspicuously does not appear in section V A. If 'length of service' is given its ordinary and natural meaning, it certainly would not mean 'Credited Service' under the Retirement Plan but simply the length of time the employee has been with the company . . . " (*id.* 15a)

> "Participation in the Retirement Plan was voluntary . . . Participation required more than an election to participate; members had to make regular contributions. In view of this it could hardly have been known to the negotiators of the Settlement Agreement that all the re-employed class members would want to participate or would have been able to make the required retroactive contributions . . . " (*id.*)

> ". . . In view of the complexity and precision of the Retirement Plan, . . . we think it most unlikely that the parties, in providing retroactive retirement credit, would have contented themselves with an oblique and uncertain reference to credit for 'length of service,'. . . The language of section V A more readily supports the conclusion that the parties did not intend to include retroactive retirement credit . . . " (*id.* 16a)

> "If the Settlement Agreement granted retroactive retirement credit to re-employed class members, American would be obligated to fund the retirement benefits actuarially attributable to these credits—an expenditure that American estimates at $850,000, or $86,500 a year for thirty years, almost a third of American's express monetary obligation under the Settlement Agreement. . . We think it unlikely that a uniquely retroactive benefit of such magnitude would have been buried so unobtrusively in the chosen language of section V A . . . if the parties had really intended to create it." (*id.* 17a-18a)

> "In addition, we think that section III D of the Settlement Agreement was intended in part to prevent just such massive monetary obligations from being teased out of the language of the Settlement Agreement after it was signed and approved .... No obligation to fund retroactive retirement benefits is expressly provided in the Settlement Agreement, and section III D bars implied obligations ... The parties knew the content of section III D and so would have realized that if the Settlement Agreement was to grant retroactive retirement credits, American's obligation to fund those credits would have to be set forth expressly in the agreement." (*id.* 18a-19a)

Petitioners contend (p. 20) that the Court of Appeals, once having found the settlement agreement ambiguous, had a duty of "stopping there and remanding the case to the district court for an evidentiary hearing" and that, instead, it "embarked on its own detailed and elaborate examination of the incomplete extrinsic evidence in the record." The petitioners assert that the Court of Appeals examined "the same incomplete extrinsic evidence" in denying their alternative motion to vacate the 1977 order approving the settlement and dismissing the actions. The record was not incomplete, as this opposing brief explains (p. 14). The Court of Appeals' disposition of the appeal, reversing the District Court order with directions on remand to deny both alternatives of petitioners' motion, followed respondent's contention to that effect in the Court of Appeals (Reply Brief, pp. 24-25).

A rehearing petition filed by petitioners in the Court of Appeals suggested a rehearing *en banc*, which required distribution of the petition among all judges in regular active service. The order of August 15, 1985 denying rehearing stated that no judge in active service had requested a vote on the petition and that all judges on the original panel voted to deny a rehearing (Pet. App. 29a). The certiorari petition was received by respondent on November 13, 1985.

ARGUMENT

I. Review of Court of Appeals' Interpretation of Settlement Is Not Warranted.

The nature of the basic interpretation issue is misconceived in the petition for certiorari. That issue is essentially whether the phrase in the settlement agreement (Sec. V A), "credited with the . . . length of service", impliedly included retroactive retirement credits when (1) "credited service" under the retirement plan required contributions rather than mere length of time of service and (2) the agreement (Sec. III D) negatived any implied obligation by respondent. Treating the issue as one of fact under Illinois law, the Court of Appeals analyzed many features of the agreement and the plan, explaining fully why retroactive retirement credits were not included and why the court did not remand for findings of fact. The petition contends that this decision was improper under *Anderson* v. *City of Bessemer City,* 470 U. S. ____, 84 L. Ed 2d 518 (1985).

As shown in Point I A below, the interpretation issue here is not similar to the issue of alleged discriminatory conduct in *Bessemer City.* Petitioners' method of conducting this proceeding is inconsistent with their request for a remand for an evidentiary hearing and findings of fact. Further, as shown in Point I B, the issue of interpreting the settlement agreement and the retirement plan actually seems to be one of law under Illinois decisions so that the general principles of *Bessemer City* limiting federal courts of review are wholly inapplicable.

A. *Court of Appeals' Interpretation as Matter of Fact Is Justified by the Record*

(1) *Bessemer City Is Not Similar*

In *Bessemer City,* after a nonjury trial with testimony by witnesses, the District Court's findings of fact concluded that petitioner had been denied employment on account of intentional sex discrimination in violation of Title VII. The Court

of Appeals, reversing, held that the findings were clearly erroneous. This Court, reversing the Court of Appeals, held it had misapprehended the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure, quoted in Appendix A hereto. The Court of Appeals' error was stated to be "its failure to give due regard to the ability of the District Court to interpret and discern the credibility of oral testimony" (84 L. Ed. 2d 531).

The *Bessemer City* opinion explained how Rule 52(a) contained the principle that it is not the appellate court's function to decide factual issues *de novo*. After quoting Rule 52(a) and describing its meaning as "not immediately apparent," the opinion said that "certain general principles . . . may be derived from our cases." The general rule against *de novo* fact finding on review was stated as one such principle:

> "The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)."[10]

The last sentence of Rule 52(a) exempts decisions on motions:

> "Findings of fact and conclusions of law *are unnecessary on decisions of motions* under Rule 12 or 56 or *any other* motion except as provided in Rule 41(b)." (Emphasis added)

The Advisory Committee Notes explain that the last sentence added in 1946 "will remove any doubt that findings and conclusions are unnecessary upon decision of a motion. . ." 28

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[10] The certiorari petition, in quoting (p. 23) the reference in *Bessemer City* to the *Zenith* opinion, fails to indicate that the statement against *de novo* decisions by appellate courts was based upon the "clearly erroneous standard" of Rule 52.

USCA, Rules 52-55, p. 18. The certiorari petition does not mention Rule 52.

The *Bessemer City* decision is not applicable to the supplementary motion proceeding here in which two legal instruments are interpreted to determine whether one (settlement agreement) granted petitioners "credited service" under the other (retirement plan). *Bessemer City* applied the "general principles" of Rule 52(a) to the main final judgment following a nonjury trial in a plenary proceeding in which the facts depended on the credibility of witnesses. That was also true of three Seventh Circuit decisions cited in the certiorari petition (p. 26n).[11] Even more remote from the present proceeding are two cited Seventh Circuit jury cases which held that the Court of Appeals could not try a jury's fact question *de novo*.[12]

(2) *Reasons Given by Court of Appeals Sustain Its Refusal to Remand for Findings*

With one exception, the certiorari petition does not attempt to contradict the "strong reasons" the Court of Appeals explained (pp. 6a-7a, quoted above, p. 8) for interpreting the settlement agreement and retirement plan instead of remanding for findings of fact by the District Court. Petitioners do not deny that the evidence in the record is entirely documentary, that no determinations of the credibility of witnesses are required. Petitioners do not even challenge the Court of Appeals' comment on its interpretation that "a contrary conclusion would be clearly erroneous." The Court of Appeals factual interpretation was eminently sound and convincing, as shown by the court's analysis noted above (pp. 8-10). A

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[11] *Barnes* v. *St. Catherine's Hospital*, 563 F. 2d 324 (7th Cir. 1977). *Continental Group Inc.* v. *Lincoln Land Moving & Storage Inc.*, 710 F. 2d 368 (7th Cir. 1983). *Denofre* v. *Transp. Ins. Rating Bureau*, 532 F. 2d 43 (7th Cir. 1976).

[12] *Leonteos* v. *Haase*, 410 F. 2d 633 (7th Cir. 1969). *Wyant* v. *J. I. Case Co.*, 633 F. 2d 1254 (1980).

contrary interpretation by the District Court would be clearly erroneous under the standard stated in *Bessemer City* because the reviewing court would be "left with the definite and firm conviction that a mistake has been committed" (84 L. Ed 2d 528). The result is, as the Court of Appeals explained, that to order a remand "would be a waste of judicial resources and an undue burden on the parties."

To refute the Court of Appeals' statement that the parties had submitted all the evidence they had, the certiorari petition repeatedly states (pp. 1, 2, 4, 20, 21, 28-32) that the record is incomplete for the decision of their motion. *Nothing in the record supports the assertion that the parties did not intend it to be complete.* The only reasonable inference from the record is that the parties considered the record ready for decision on all issues. The Court of Appeals' thorough analysis of the meaning of Section V A of the settlement agreement shows that the record contains unusually full materials to support the conclusions reached. Petitioners assert that "a wealth of extrinsic evidence potentially exists relevant to the issue" (p. 29). They specify nothing to explain this vague speculation.

The nature of the documentary evidence is particularly significant. The extraneous documents analyzed in the opinion were not fugitive pieces of paper but comprehensive legal instruments, such as the retirement plan itself and labor contracts between the flight attendants' union and respondent. The retirement credits petitioners seek are rights under the retirement plan, which is not extraneous but the central element of petitioners' claim. The pertinent provisions of the plan are not ambiguous. The Court of Appeals decision is more like a decision of law than a finding of facts.[13]

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[13] Petitioners could not contend that *Bessemer City* required a remand for findings of fact if the Court of Appeals had taken the position that the interpretation of the settlement agreement and the retirement plan was a legal decision, as held of labor contracts and

(Footnote continued on following page)

(3) *Petitioners Submitted Interpretation Issue for Decision by Court of Appeals*

The supplementary nature of this proceeding, unlike the plenary procedure in *Bessemer City*, is apparent from the manner in which it was conducted. As indicated in the Statement of the Case, the initiating paper was designated as a "motion" and stated in its first paragraph that it was made pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. Rule 60, entitled "Relief from Judgment or Order", concludes that "the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." Petitioners chose the more summary motion procedure. Their unqualified designation of the motion as filed under Rule 60 set the stage for the usual contested motion practice, without evidentiary hearings but with extrinsic materials presented by exhibits and affidavits, under Rules 12 and 13 of the United States District Court for the Northern District of Illinois.[14] That practice does not even permit oral argument unless allowed in the court's discretion on request.

(Footnote continued from preceding page)

employee benefit plans in *Mackey v. National Football League*, 543 F. 2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U. S. 801, and *Teamsters L. 3481 H. & W. Fund v. Kohn Beverage Co.*, 749 F. 2d 315, 317-8 (6th Cir. 1984), *cert. den.* 105 S. Ct. 2024. See Point I B below, pp. 18-21, to the effect that the interpretation issue here can reasonably be considered to be one of law under Illinois decisions.

[14] Rule 12, quoted in Appendix B hereto, entitled "Motions", providing in detail for the procedure for presenting motions, states in subdivision (c), "Where evidentiary matter . . . will be submitted in support of a motion, copies thereof shall be served with the notice of the motion." Rule 13, "Hearing of Contested Matters", provides for the filing of memoranda by the parties supporting and answering "a contested motion, objections or other matters calling for a decision of the Court." Subdivision (d), after stating that any party may on notice call the motion or matter to the attention of the court, concludes, "When requested, oral argument may be allowed in the court's discretion."

The District Court record consisted only of papers filed in accordance with contested motion practice. Exhibits were attached to memoranda supporting and opposing the motion. Petitioners argued that the terms of the settlement agreement under the law of the State of Illinois, where the agreement was executed, were clear and unambiguous and that the interpretation granting them retroactive retirement credits was a pure question of law (Rec. App. 48, 52). But the petitioners' memoranda also discussed other documents in the record as well as affidavits they had filed (*id.* 97, 135). Neither petitioners nor respondent took depositions or sought an evidentiary hearing.

The prosecution of this proceeding under the contested motion practice was that followed in other enforcement proceedings in this litigation. After the settlements in the TWA and this American action, numerous motions were filed for claims under the settlement agreements by various former or rehired flight attendants. As cited in footnote 3 above, p. 3, three of the motion proceedings interpreting the TWA agreement produced opinions by the Court of Appeals, No. 82-1889 (unpublished), 713 F. 2d 319 and 730 F. 2d 509, cert. den. 105 S. Ct. 167.

In the Court of Appeals in this proceeding, the briefs filed by petitioners and respondent made no contention that it would be beyond the function of the Court of Appeals to interpret the settlement agreement from the materials in the record. Petitioners' brief relied on the materials outside the settlement agreement, such as Ms. Burmeister's affidavit for an account of a demand for retirement plan credits by her and another class member (pp. 5-7); provisions of the retirement plan (p. 7, n); a 1981 union contract (p. 27); circumstances surrounding execution of the agreement (pp. 32-35); a 1982 regulation of respondent (p. 20). They did not contend that the Court of Appeals could not interpret ambiguous terms of the agreement or consider extraneous materials.

On the contrary, petitioners conceded that extrinsic materials in the record could be considered. Their brief asserted that, if the court concludes that the terms of the agreement are ambiguous "and that the extrinsic evidence of record is insufficient to resolve the parties' intent", the case should be remanded with directions to "consider additional extrinsic evidence" (p. 49). They thus indicated that existing extrinsic materials in the record, if found sufficient, could be used by the Court of Appeals to "resolve the parties' intent." That was the conclusion of the Court of Appeals.

It was only after the Court of Appeals decision went against them that they contended in the petition for rehearing, as in their certiorari petition, that the decision was a *de novo* adjudication of facts beyond the Court of Appeals' function as a reviewing tribunal.

Illinois decisions on contract interpretation show that, in this situation, petitioners may not complain. In *Fields* v. *Franklin Life Ins. Co.*, 115 Ill. App. 3d 954, 958 (1983), instructions to the jury submitted by the plaintiff directed them to determine the meaning of a written instrument. On appeal, after the jury ruled against the plaintiff, the Appellate Court agreed with plaintiff's contention that the instrument was free from ambiguity and that its meaning was a question of law. But the court sustained the verdict (citing earlier decisions):

> ". . . although it was improper to allow the jury to determine the meaning and effect of this . . . receipt, where it was done at the request of the plaintiff, she can hardly complain that the jury resolved the issue of its meaning against her."

Petitioners waived any right to an evidentiary hearing by adopting and following the customary supplementary motion procedure to obtain a judicial interpretation and enforcement of the settlement agreement. The District Court might have granted a request for an evidentiary hearing. They made no such request and carried on no discovery. Their conduct of the proceeding in the District Court and the Court of Appeals indicated that they expected the settlement agreement to be interpreted from the materials then in the record.

B. *Court of Appeals Decision Is Sustained by Interpretation as Matter of Law Under Illinois Decisions.*

The Court of Appeals opinion turns on the distinction between issues of law and fact. It decided the interpretation of the settlement agreement as a factual issue only because it followed (p. 4a) the statement in an Illinois case, *Hagerty etc.* v. *Ginzkey*, 85 Ill. App. 3d 640, 641 (1980), to the effect that, if a contract is held to be ambiguous, the meaning becomes a question of fact to be submitted to the trier of fact. Accordingly, the opinion discussed all the evidence in the record in reaching its conclusion that Section V A of the settlement agreement did not grant the petitioners retroactive retirement credits under respondent's retirement plan. However, in addition to this roundabout route in deciding the interpretation issue as a question of fact, the same conclusion can be reached through either or both of two more direct routes by deciding the issue as a question of law under Illinois cases that refine the distinction between questions of fact and law.[15]

(1) Any possibility that retroactive retirement credits are included in the phrase "credited with the . . . length of service" in Section V A of the settlement is destroyed by the definition of "Credited Service" in the plan. That definition, as noted above, p. 5n8, states that credited service "shall not include any period for which he or she does not make Employee Contributions." The definition cannot be controverted. So *length of service* is not enough to get petitioners *credited service* under the plan.

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[15] Difficulties are to be expected over what this Court recently described as "the vexing nature of the distinction between questions of fact and questions of law." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 288 (1981). The opinion noted that Rule 52(a) "does not furnish particular guidance with respect to distinguishing law from fact "and that the Court did not" yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion." The Illinois cases to be discussed (pp. 20-21) provide a guidance for an interpretation of the settlement agreement as a question of law that excludes the claimed retirement credits.

and Section V A did not grant retroactive retirement credits. This conclusion is a matter of law, not fact, under any reasonable law-fact distinction.

The Court of Appeals made a more factual analysis of the effect of the definition of "Credited Service", relating it to the probable intention of the parties. The opinion says that, if the parties had intended to accord retroactive retirement credits to reemployed class members, it is highly likely that they would have used distinctive terms like "retirement credit" or "Credited Service" and

> "would have provided all re-employed class members the option of joining the plan or not, provided for the effective date of joining, and provided for the payment of back contributions so as to bring each member's account up to date" (Pet. App. 16a)

If this analysis is factual inference, it is based on the unambiguous definition of "Credited Service" in the retirement plan.

(2) Section III D of the settlement agreement presents a clear question of law. As explained in the above Statement of the Case, the design of the settlement agreement was to impose certain expressly stated obligations on respondent in Clauses A, B, and C of Section III and to relieve respondent of any monetary or other obligation "unless expressly provided", as stated in Clause D of Section III.[16] The opinion of the Court of Appeals said of Section III D (p. 18a):

> "No obligation to fund retroactive retirement benefits is expressly provided in the Settlement Agreement, and Section III D bars implied monetary obligations."

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[16] The retroactive addition of petitioners to retirement plan membership would have required payment of substantial sums of money by respondent for the large number of nonworking years involved. This is indicated by the estimated funding for retroactive credits under the District Court order amounting to one payment by respondent of $850,725 or $86,502 a year for 32 years. (Rec. App. 156). See the quotation of the Court of Appeals opinion, above p. 9.

Any doubt of whether Section V A impliedly included retroactive retirement credits is removed by Section III D, the provisions of which cannot be controverted and are not ambiguous.[17] No factual issue was involved in the conclusion that Section V A did not include retroactive credits since they were not specified in the section. This conclusion by the Court of Appeals amounted to a decision as a matter of law that the settlement agreement does not include such credits.

Such uses of incontrovertible documentary materials to interpret ambiguous terms of an agreement are decisions of issues of law under governing holdings of Illinois courts. In *Nerone* v. *Boehler,* 34 Ill. App. 3d 888, 891 (1976), the court noted that undisputed extrinsic facts may be used to ascertain the true meaning of an ambiguity in a contract as a matter of law. The opinion explained (italics added):

> "When the evidence of extrinsic facts is uncontroverted or shows the contract to have but one meaning, the court need not resort to inquiry by the trier of fact, *but must determine the meaning of the contract as a question of law.*"

In a more extensive discussion, *Ridenhour* v. *Mollman Publishing Co.,* 66 Ill. App. 3d 1049, 1051 (1978), explained:

> "The first issue which we feel compelled to address is the propriety of the trial court submitting a case involving the construction of a contract to the jury. Although the parties did not raise this issue on appeal, we believe that this case is not within the province of the jury. The law is well settled that the construction, interpretation and legal effect of a contract are issues to be resolved by the court as questions of law. (Citing cases) We note that if the construction of a written agreement is dependent upon extrinsic facts that are disputed by the parties, a situation

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[17] The legal effect of Section III D was to negative the principle of contract interpretation that what is "plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed". 17 Am. Jur. 2d *Contracts,* § 255, p. 649; 4 *Williston on Contracts* 534 (1961).

> not present here, the case must be submitted to the jury. (Citing cases) The only extrinsic evidence introduced in this case which allegedly reflected on the construction of the contract was that three Mollman employees received severance pay after being terminated for their incompetence. *Such evidence, however, was uncontroverted and, therefore, did not present a question of fact. Consequently, its legal effect, although in dispute, remains to be resolved by the court.*" (Ital. added)

To the same effect, see *National Tea Co.* v. *Commerce and Industry Ins. Co.*, 119 Ill. App. 3d 195, 200 (1983).

These Illinois decisions show that it is a legal rather than a factual conclusion for the court to decide that the alleged ambiguity of Section V A is resolved by the definition of credited service in the retirement plan and by Section III D of the settlement agreement. This result, supporting the same result reached by the Court of Appeals by the factual route, demonstrates fully that the certiorari petition should be denied.

There is no doubt that it is thus proper for respondent to advance grounds opposed to the grant of certiorari and in support of the decision sought to be reviewed although they were not discussed by the Court of Appeals. *Hankerson* v. *North Carolina*, 432 U.S. 233, 240, n6 (1977); *Dandridge* v. *Williams*, 397 U.S. 471, 475, n6 (1970). Stern & Gressman, *Supreme Court Practice* (5th Ed.) 478.

II. Review of Court of Appeals' Rejection of Motion to Vacate Is Not Warranted.

The record refutes the petitioners' contention that, the District Court not having reached the issue, the Court of Appeals should not have ruled on their alternative motion under Rule 60(b)(6) to vacate the 1977 order approving the settlement and dismissing the actions.

Petitioners' motion did not seek relief for any of the many reasons specified in Rule 60(b), including mistake, fraud,

misrepresentation, misconduct of an adverse party, etc. Any such ground was unavailable in 1983 to set aside the 1977 order for the motion must be filed within one year after the judgment. Petitioners' motion stated it was filed under Rule 60(b)(6), which is a general provision, "any other reason justifying relief from the operation of the judgment", for which the limitation is "within a reasonable time."

"Extraordinary circumstances" must be shown for relief under Rule 60(b)(6). *Ackermann* v. *United States,* 340 U.S. 193, 202 (1950). *Goland* v. *Central Intelligence Agency,* 607 F. 2d 339, 373 (D.C. Cir. 1979), *cert. den.* 445 U.S. 927. *Merit Ins. Co.* v. *Leatherly Ins. Co.,* 714 F. 2d 673, 682 (7th Cir. 1983), *cert. den.* 464 U.S. 1009. This Court emphasized in *Ackermann,* "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

Petitioners' motion and the affidavits filed in support show on their face that they fail completely to state a claim on which relief from the 1977 order can be granted. Instead of extraordinary circumstances to justify relief, they show nothing of substance.

The motion (Rec. App. 1) did not allege any fact or legal theory as a basis for vacating the 1977 order. In a reply memorandum, petitioners stated that, if the settlement agreement did not grant retroactive retirement credits, they were misled by the agreement and that the notice of the settlement to class members failed to describe adequately the benefits they were entitled to (*id.* 132). The notice described the settlement, informed the class members of a hearing on it, stated they could attend, could file written comments, etc. (*id.* 29-33). The notice said nothing about the retirement benefit plan. An affidavit of Ms. Burmeister stated that she had been led to believe that the agreement included retirement plan benefits when she signed the agreement (*id.* 98). The only factual basis asserted for her being misled is her statement that, before the settlement

agreement was made, she had explained, apparently to "one of the counsel for plaintiffs," "that retroactive credited service under the Retirement Plan must be included in the 1977 agreement in order for it to be acceptable to me" (*id.*).

The Court of Appeals (pp. 21a-22a) concluded that a remand was unnecessary for a ruling on the alternative motion because it had all the briefs and evidence presented to the District Court to decide the motion. It therefore departed from its usual practice in the interest of judicial economy and ruled on the motion instead of remanding it for decision below.

It is abundantly clear from the record that, for many reasons, there is no merit whatever to the motion to vacate:

(1) In 1977, through their counsel, petitioners chose to enter into a settlement agreement which contained no express provision for retroactive retirement benefits and excluded any benefit not so provided. After notice under Rule 23(e) of the Federal Rules of Civil Procedure, they chose not to object to the settlement but to seek its approval in the federal courts.

(2) The approval order petitioners want to vacate was procured by their own counsel in the District Court in 1977. They urged its affirmance in the Court of Appeals (573 F. 2d 960) and the denial of certiorari to review the affirmance (439 U. S. 876).

(3) The notice they claim to have misled them was prepared by their own counsel (Sec. IX of settlement agreement, Rec. App. 22) and was approved by the District Court as required by Rule 23(e). Any misleading of petitioners by their own counsel would at most create a claim against their counsel, not against respondent.

(4) Ms. Burmeister did not employ counsel for the claim to retroactive retirement benefits under the settlement until September 1982 (*id.* 136). So far as appears, she never

consulted the unnamed counsel who she said had led her to believe, before she signed the agreement, that retroactive retirement credits were included in it. Nor, so far as appears, did she ever seek a remedy through the counsel who had successfully represented her and the class since 1974.

(5) Overturning the order approving the settlement and dismissing the actions would begin the litigation all over and lead to a trial on pleadings filed in 1970, 1972, and 1974. The difficulties of litigating would be materially magnified by petitioners' lack of diligence, which also indicates the weakness of the claim.

The merits of the motion to vacate were fully argued in the Court of Appeals (Respondent's original, Rec. App. 38-42, 44, and reply pp. 17-22 briefs; Petitioners' brief, pp. 41-7.) As the Court of Appeals stated (Pet. App. 22a, n24), it also had before it the briefs and evidence presented in the District Court. It was therefore in as good a position as the District Court to decide the motion. It departed from its usual remanding practice "in the interest of judicial economy" and to "put the question of retroactive retirement credits under the Settlement Agreement finally to rest" (*id.*).

The petition for certiorari presents nothing specific for which a remand for supporting evidence would be justifiable. It is not uncommon for motions for relief from a judgment to be disposed of without a hearing. In *United States Fidelity & Guaranty Co.* v. *Lawrenson*, 34 F.D.R. 121, 123 (D.C. Md. 1964), aff'd 334 F. 2d 464 (4th Cir.), *cert. den.* 379 U.S. 869, the District Court opinion noted that it "cannot grant a hearing in every motion filed, since those of a frivolous nature would impede the progress of those which are meritorious", and the motion was said to be "clearly without substance." The Court of Appeals quoted the District Court opinion with approval and cited cases to the point that the movant was not deprived of due process of law by disposing of the motion without a hearing (p. 467).

Petitioners' position is not supported by decisions which petitioners claim conflict with the Court of Appeals' rejection of the motion to vacate instead of a remand for District Court disposition. In fact, *Dandridge* v. *Williams*, 397 U.S. 471, 476 n6 (1970), on which they mainly rely, fully sustains the Court of Appeals decision. There the District Court, which held a state regulation unconstitutional, did not consider a contention that it violated a federal statute. The Supreme Court took up and rejected the alleged statutory violation, explaining:

> "When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court. See *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464, 468; *United States* v. *Ballard*, 322 U.S. 78, 88. That is not the situation here, however. *The issue having been fully argued both here and in the District Court, consideration of the statutory claim is appropriate.*" (Ital. added)

The cited *Aetna* case, relied on in the petition here, remanded the case for consideration of an issue that had not been adequately presented in the Supreme Court. *Dandridge* holds that in some circumstances it is "appropriate" for a court of review to rule upon issues not reached in the court below.

Dandridge has been followed in later cases in which, as here, a due process issue not ruled on below was an alternative to the issue then decided. This court took up and decided the due process questions *de novo*. *Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 244 n6 (1983), rejected respondent's claim under the Eighth Amendment and then proceeded to deny any remedy under the due process clause of the Fourteenth Amendment. The opinion noted that the alternative due process issue "has been fully briefed and is properly before us", citing *Dandridge*, and "there would be little point in remanding" to allow the court below (Supreme Judicial Court of Massachusetts) to reconsider its holding under the relevant constitutional provision.

Thigpen v. *Roberts*, 468 U.S. ___, 82 L. Ed. 2d 23, 30 (1984), did not pass on a claim of double jeopardy raised in the petition for certiorari but held that the respondent's conviction was invalid under the due process clause. In denying the petitioners' contention that the due process issue should have been remanded to the Court of Appeals, this Court explained, after citing *Dandridge*, that the issue had been argued in the courts below and the factual record was "adequate, and would not be improved by a remand."

Petitioners, failing to understand that whether to remand is a matter of *appropriateness*, are wrong in finding a conflict between the Court of Appeals decision here and the Second Circuit holding in *Securities Investor Protection Corp.* v. *Morgan, Kennedy, & Co. Inc.*, 533 F. 2d 1314, 1322 (2d Cir. 1976). The issue for which the case was remanded for consideration had "received a minimum of attention by the parties", as the opinion explained in detail. The opinion then cited *Dandridge* and *Aetna* for the Supreme Court's caution against the consideration on review of issues "not adequately presented in the reviewing tribunal."

Here, as shown by the many sound reasons noted above, petitioners have presented nothing positive to support their motion to vacate, which can be granted only under "extraordinary circumstances." The record contains much that negatives the motion.

III. Court of Appeals Decision of Motion Without Remand Was Sound Judicial Administration.

It was a sensible and reasonable exercise of its function as a reviewing court for the Seventh Circuit to decide both alternatives of petitioners' motion rather than to remand to the District Court for an evidentiary hearing and decision.

The Court of Appeals had had extensive experience in reviewing various aspects of the litigation in many appeals listed above (p. 3 footnote 3). The issues in seven of the

appeals involved settlements in the *American* or *TWA* cases, as does the appeal here. The 1972 opinion in the first appeal, reported at 455 F. 2d 101, involving the 1971 settlement that was later disapproved in the second appeal, was written by Chief Judge Cummings who was on the panel that decided the appeal from which petitioners now seek review. The Court of Appeals knew the sound reasons for adjudicating petitioners' motion in the interest of judicial economy. It was entirely appropriate for that court to consider and reject the wholly unmerited motion to vacate rather than, by remanding for adjudication by the District Court, to postpone its decision on the same question until a probable appeal from a District Court order entered on remand.

Petitioners emphasize the expertness of Chief Judge McGarr in adopting their interpretation of the settlement agreement (p. 34). Pointing out that he reviewed, assessed, and approved the terms of the 1977 agreement, they ask, "who, other than Judge McGarr, was and is better qualified to ascertain the true meaning of the 1977 Agreement?" Retroactive retirement benefits were not mentioned in the hearing before Judge McGarr in 1977 (Pet. Br., App. 8-19) nor in his order of October 4, 1977 approving the settlement. His order of May 1983, reversed by the Court of Appeals, contained glaring errors. It did not mention the definition of "Credited Service" in the retirement plan nor Section III D of the settlement, each of which negative petitioners' claim to retirement credits. His memorandum read into the agreement, what was not there at all, that its clear terms entitled the returning class members "to receive any and all of the benefits they would have received had they not been discharged by American" (Pet. App. 26a, 27a).

The opinion of the Court of Appeals affirming the 1977 order (573 F. 2d 960-965) and the opinion now involved that reversed the May 1983 order are much more thorough and comprehensive than the District Court opinions and orders. Deference is due the Court of Appeals for its familiarity with

the litigation. Its decision of the need to terminate the litigation is based on the experience of years spent in its judicial administration.

Considering the interpretation of Section V A of the settlement agreement to be an issue of fact, as did the Court of Appeals, a remand for a decision below would be futile because any result contrary to its interpretation would be clearly erroneous, as the opinion explained (see above, pp. 13-4). Considering the issue as one of law under Illinois decisions, the Court of Appeals had a duty to adjudicate it. The rejection of the alternative motion to vacate, which obviously failed to state a claim for relief, was entirely appropriate in accordance with the principle of the *Dandridge* decision (above, p. 25). The Court of Appeals rightly avoided further rounds of argument in the District Court, another probable appeal to the Court of Appeals, and another effort to obtain certiorari here.

CONCLUSION

It was right and reasonable for the Court of Appeals to put a quietus on this litigation by deciding and rejecting both alternatives of petitioners' motion. The grant of certiorari would itself delay the final termination of the 1970 litigation which the settlement was intended to achieve in 1977. When this litigation is rightly understood, it is plain that the petition is wrong in contending that the Court of Appeals decision departs from usual and accepted judicial procedure. Nor does the decision conflict with holdings of this Court and Courts of Appeals as the petition wrongly asserts. Respondent urges its denial.

Respectfully submitted,

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Appendix A

Excerpts from Federal Rules of Civil Procedure

Rule 52.

FINDINGS BY THE COURT

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(As amended Apr. 28, 1983, eff. Aug. 1, 1983).

Rule 60.

RELIEF FROM JUDGMENT OR ORDER

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

Appendix B

Excerpts from Rules of the United States District Court for the Northern District of Illinois

RULE 12. Motions

(a) **Service of motion.** Except as otherwise provided herein or in the Federal Rules of Civil Procedure, motions may be presented and heard upon proof of written notice thereof served at or before 4 o'clock P.M. of the second business day preceding the day of presentment, Saturdays and legal holidays excluded. Where service of such notice is by mail, the notice shall be mailed at least seven days before the day of presentment. *Ex parte* motions and motions presented on stipulation may be presented without notice.

(b) **Copies to be presented to minute clerk.** Copies of all motions shall be presented to the minute clerk of the judge before whom the motion is to be made by 4:30 P.M. of the *second business day* before the motion is to be presented in court by counsel whose offices are located in Chicago. Counsel whose office is outside of the Chicago city limits may telephone the minute clerk by 4:30 P.M.

(c) **Copies of evidentiary matter to be served.** Where evidentiary matter, in addition to affidavits permitted or required under Rules 5 and 6 of the Federal Rules of Civil Procedure, will be submitted in support of a motion, copies thereof shall be served with the notice of the motion.

(d) **Motions for discovery and production; Statement of efforts to reach an accord.** To curtail undue delay in the administration of justice, this Court shall hereinafter refuse to hear any and all motions for discovery and production of documents under Rules 27 through 37 of the Federal Rules of Civil Procedure, unless moving counsel shall first advise the court in writing that after personal consultation and sincere

attempts to receive differences they are unable to reach an accord. This statement shall recite, in addition, the date, time, and place of such conference, and the names of all parties participating therein.

RULE 13. Hearing of Contested Matters

(a) Any moving party filing a contested motion, objections or other matters calling for a decision of the Court, shall file with the Clerk, within five days thereof, a short concise memorandum in support of his/her position, together with citations of authority. The adverse party shall file within ten days thereafter, an answering memorandum. The moving party shall file within five days thereafter, a reply memorandum. All briefs shall be filed in duplicate and copies served upon all other parties.

(b) Failure to file a supporting or answering memorandum shall not be deemed to be a waiver of the motion or a withdrawal of opposition thereto, but the court on its own motion or that of a party may strike the motion or grant the same without further hearing. Failure to file a reply memorandum within the requisite time shall be deemed a waiver of the right to file.

(c) The court may by order excuse the filing of supporting, answering and reply briefs and may shorten or extend the time fixed by this rule for the filing of briefs.

(d) Any party may on notice provided for by Rule 12(a) hereof call the motion or matter to the attention of the court for decision. When requested, oral argument may be allowed in the court's discretion.